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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1976

## No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
*Petitioners,*

VS.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONERS

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vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 528 F.2d 1208 and is appended to the petition for writ of certiorari as Appendix A. The decision of the United States Court of Appeals for the Ninth Circuit in *Hutchison v. Lake Oswego School District No. 7* is reported in 519

F.2d 961 and is appended to the petition for writ of certiorari as Appendix B. The opinions and the judgment of District Judge Alfonso J. Zirpoli are appended to the petition for writ of certiorari as Appendix C.

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**JURISDICTION**

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on December 9, 1975. Petition for certiorari was filed within 90 days of that date and granted on January 25, 1977, ....., U.S. ..... Petitioners invoke the jurisdiction of this Court under 28 USC Section 1254(1).

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**STATUTES INVOLVED**

The primary statutes and regulations concerned in this case are 42 USC §2000e-2(a), 42 USC §2000e-5(b), 42 USC §2000e-5(e), 42 USC §2000e-5(f)(1), 42 USC §2000e-5(f)(2), 29 C.F.R. §1601.8, 29 C.F.R. §1601.25b(c), 29 C.F.R. §1604.10(b), California Education Code §13456, and California Education Code §13468. The text of these statutes and regulations is appended to this brief as Appendix A.

---

**QUESTIONS PRESENTED**

I. May an action under Title VII be maintained notwithstanding (1) that the statutory notice of the right to sue had not been received when the action



was filed and (2) that the underlying EEOC charge was defective?

II. Under Title VII of the Civil Rights Act must an employer pay sick leave for absences due to normal pregnancy and delivery?

III. Under Title VII of the Civil Rights Act is an employer prevented from making a factual, medically based determination as to the ability of a pregnant employee to continue working?

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**STATEMENT OF THE CASE**

Sonja Lynn Berg was a teacher employed by the defendant Richmond Unified School District (hereafter "School District"). Prior to November 29, 1972, the School District maintained a maternity leave policy, authorized by California Education Code §13456, which provided for a mandatory leave of absence commencing no later than the seventh month of pregnancy, and did not allow the use of accumulated sick leave credits to permit pay during maternity leave (A. 7, 8, 87, 88; ¶VII, VIII).

On November 15, 1972, Mrs. Berg filed a charge of discrimination with the Equal Employment Opportunity Commission (hereafter EEOC) against the School District, W. W. Snodgrass, District Superintendant, and Sam Teese, Assistant Superintendent-Personnel. The charge purports to be under oath, but does not show that it was sworn to (A. 109). Mrs. Berg described her complaint as follows (A. 109), *emphasis added:*

"I am a kindergarten teacher in the Richmond Unified School District. My husband is presently a full-time student. I am pregnant and was planning to work until my delivery date or as long as possible. My doctor and I feel that there is no medical or personal reason why I should not be able to. But according to school district regulations, I must request a 'maternity leave' commencing no later than the start of the seventh month of pregnancy which is only 5 weeks away. In addition, I have 27 days sick leave which I will not be paid for under regular sick days or emergency leave policy. *Up to this point, I have had no written correspondence with the district concerning this matter.* Together with my husband, I am frantic over our impending financial crisis which is the result of the discriminatory practices of the school district. (See Title 29, Labor, Chapter XIV, Part 1604, Sec. 1604.10)"

On November 29, 1972, the governing board of the School District discussed its then current maternity leave policy. Superintendent Snodgrass stated that an updated maternity leave was being researched by the County Counsel and was under discussion with the Certificated Counsel (a teachers' bargaining representative, California Education Code §13085), and requested that the board take interim action to consider employee requests to work beyond the start of the seventh month of pregnancy, on an individual basis (A. 17-20). On December 13, 1972, the governing board approved the proposed interim maternity leave policy (A. 21-24).



On December 14, 1972, Mrs. Berg notified the District that she was pregnant, that her child was expected to be born on March 24, 1973, and that she requested a pregnancy leave of absence to begin on February 23, 1973, one month before the expected date of delivery (A. 9, 37). On December 20, 1972, Mrs. Berg submitted a further request, supported by a statement from her physician, that her pregnancy leave begin on March 23, 1973, one day before her expected delivery date (A. 9, 25, 26). Her doctor's letter was dated December 6, 1972, and stated:

"Mrs. Bergs estimated date of confinement is March 24, 1973.

Mrs. Berg may work until the date of her confinement—March 24, 1973, and not stop at the seventh month date which will be January 13, 1973.

If there is any additional information you need, please contact this office."

The School District responded on December 27, 1972, as follows (A. 28):

"Out of concern for District liability and effectiveness of the educational program, we would prefer to involve a District appointed physician in any decision related to extension of your maternity leave to one day prior to date of confinement.

Should a District physician recommend the extension of leave, the District would still reserve the right to commence the leave earlier should liability or educational program become a consideration.

We shall be pleased to process, on receipt, your request to see a District physician."

By a letter from her attorney, Mrs. Berg refused to be examined by a District physician (A. 29-33), and there was no further communication between the parties prior to filing of the District Court action.

On January 12, 1973, counsel for Mrs. Berg wrote to the EEOC and requested a notice of her right to sue (R. 124).

On February 5, 1973, she filed this suit in the District Court as a class action based on 42 USC §§1981 and 1983, the Fourteenth Amendment to the United States Constitution, and 42 USC §§2000e, et seq. Jurisdiction was invoked under 28 USC §§1331 and 1343(3) and under 42 USC §2000e-5(f) (A. 1, 5).

On February 8, 1973, Mrs. Berg filed a motion for preliminary injunction (A. 1, 28).

In opposition to the motion for a preliminary injunction, the School District obtained a medical opinion on the subject of employment of pregnant teachers during the late period of their pregnancy and adopted a revised "interim" maternity leave policy (A. 47-56). The affidavit of Maxwell Thebaut, M.D., a board certified specialist in obstetrics and gynecology, showed inter alia:

a. ". . . a teacher in late pregnancy presents a high degree of risk with respect to the sudden onset of spontaneous medical emergencies." (A. 53)

b. ". . . a teacher in late pregnancy is likely to be temporarily disabled or required to leave her



class suddenly and unexpectedly, on a temporary or indefinite basis as the result of conditions present in normal pregnancies. . . ." (A. 53).

c. ". . . a teacher in late pregnancy presents a high degree of risk with respect to medical emergency and harm to herself and her foetus: a. When she undergoes ordinary jostling and bumping incident to the movement of students on school premises; b. When she is required to supervise student games and sports . . ." (A. 54).

d. ". . . a teacher in late pregnancy can be expected to have unusual difficulty in coping with minor emergency situations such as student fights, accidents, and illnesses." (A. 55).

e. "In my opinion, a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy, and any medical report stating that a pregnant teacher may work until the date of her confinement would be inconsistent with prudent medical practice in the specialty of obstetrics and gynecology." (A. 56).

The affidavit of Sam Teese, Assistant Superintendent of Personnel, showed the School District had adopted a revised interim maternity leave policy, as follows:

"'Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:

A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the

available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes, and pupils.

B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.

C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.

a) The expected date of delivery, and the date to which the physician recommends continued employment.

b) A statement as to whether the pregnancy is unusual in any respect.

c) A statement as to the current health of the employee and the foetus.

d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the foetus or the District, given that the employment may include the following factors:

Maintaining control and direction of approximately 30 active students.

Staying with a class for periods of not less than one hour without interruption.

Undergoing jostling and bumping incident to the movement of students on school premises.



Supervising games and sports of students.

Coping with student fights, accidents and illnesses.

Driving to and from work.

D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement.'" (A. 47-49).

The affidavit of Sam Teese showed that Mrs. Berg's teaching duties, and those of teachers generally, included the factors of employment identified in part C(d) of the School District's revised interim maternity leave policy (A. 49-50). His affidavit also showed that neither Mrs. Berg or any other School District employee was subject to termination of her employment by virtue of maternity leave (A. 50).

In response to the School District's position, Mrs. Berg filed an affidavit by Robert Tomfohrde, M.D., *dated December 21, 1972,* stating (A. 74):

"I am a medical doctor. I am familiar with Sonja Lynn Berg, as she has been under my care during her pregnancy.

As of this date there is no medical contraindication for this patient, Sonja Lynn Berg, to work as a teacher until the date of her confinement, March 24, 1973."

After hearing on February 22, 1973, the District Court issued a preliminary injunction, and Mrs. Berg continued to teach until the day before her child was born. (A. 78, 103).

On April 23, 1973, Mrs. Berg noticed a motion to file a "Supplement to Complaint" to allege the issuance of notice of her right to file a civil action under Title VII, on February 21, 1973 (A. 2, 83). This motion was granted by the District Court on June 6, 1973 (A. 94), and a Supplement To Complaint was filed by Mrs. Berg on June 7, 1973 (A. 3, 95). The Supplement To Complaint alleges that on February 21 ,1973 the plaintiff's right to maintain the action under Title VII was noticed by the Department of Justice and incorporates a letter of that date to Mrs. Berg (A. 95-97).

On July 20, 1973, Mrs. Berg noticed a motion for summary judgment against the School District (A. 3, 99). On August 13, 1973, the School District responded to Mrs. Berg's summary judgment motion and filed its own cross-motion for summary judgment (A. 105). The School District argued, inter alia, that the District Court lacked subject matter jurisdiction of Mrs. Berg's Title VII claim (R. 263), and that the School District's interim maternity leave policy did not violate Title VII (R. 265). Together with its arguments, the School District filed a copy of Mrs. Berg's November 15, 1972, EEOC charge with the District Court (A. 108-113). After hearing on August 20, 1973, the District Court made and on August 31, 1973, filed its order granting Mrs. Berg's motion for summary judgment on her Title VII claims and granting in part her motion to certify a class action (A. 121).

On December 4, 1973, the District Court entered its judgment certifying a class and granting Mrs. Berg



a summary judgment (a) enjoining defendants from denying Mrs. Berg accumulated sick leave compensation for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery, and (b) enjoining defendants from adopting or enforcing policies on commencement and duration of leave, reinstatement, and payment of sick leave which apply to disability due to pregnancy or childbirth on terms and conditions different from those applied to other temporary disabilities. This judgment also awarded Mrs. Berg $3,675.00 in attorney's fees (A. 121). The judgment of the Trial Court was affirmed by the Ninth Circuit Court of Appeals, and Mrs. Berg was awarded an additional $1,500.00 in attorney fees (528 F.2d 1208).

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## SUMMARY OF ARGUMENT

I. The District Court lacked subject matter jurisdiction of Mrs. Berg's Title VII claims because she failed to comply with the statutory prerequisites to suit under the statute. The statutory prerequisites which Mrs. Berg did not meet were (i) filing timely and valid EEOC charges of employment discrimination and (ii) receiving a notice of her right to sue.

A. When Mrs. Berg filed her EEOC charge of discrimination respecting the School District's maternity leave policies, those policies had not been applied to her, and her charge was premature. Mrs. Berg's charge as filed was purportedly "under oath", but it failed to show that her oath had been taken by any

person authorized to administer an oath. The charge therefore failed to meet the statutory requirement that be under oath and in the form required by the Commission. There was no showing that this defect had been remedied when her action was filed or when judgment was granted by the District Court.

B. Mrs. Berg did not receive the statutory notice of her right to sue until after this action was filed. The Court of Appeals nevertheless upheld the District Court's Title VII jurisdiction on two grounds: 1) that the District Court could take jurisdiction of a private Title VII action to grant preliminary injunctive relief pending compliance with the statutory prerequisites to suit, and 2) that late receipt of the notice of right to sue cured any jurisdictional defect. The Court of Appeals' decision is based primarily on the *Drew* and *Henderson* cases, which adopted the two theories of jurisdiction it relied upon.

1. *Drew v. Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973), is based upon the premise that jurisdiction to grant preliminary injunctive relief exists by implication respecting civil rights act claims which have no express statutory jurisdictional basis. That reasoning is not applicable to claims under Title VII because Congress has made express provision for private actions under that statute. Further, in following *Drew*, the Court of Appeals adopted a theory of presumed irreparable injury resulting from a perceived Title VII violation, contrary to this Court's decision in *Rondeau v. Mosinee Paper Corporation*, 422 U.S. 49 (1975).



2. *Henderson v. Eastern Freight Ways, Inc.*, 460 F.2d 258 (4th Cir. 1972), upheld the curative powers of a late notice of right to sue, relying on the general policy of the law to prevent loss of rights by premature action. But that policy was developed and expressed in cases involving matters over which the courts had discretion to forgive premature steps and in which subject matter jurisdiction was not questioned. The policy relied upon in *Henderson* is not applicable with respect to the acquisition of subject matter jurisdiction under controlling statutes.

3. In upholding jurisdiction the courts below contravened established rules of decision. First, they upheld jurisdiction by implication under a statutory scheme which includes express provisions limiting private actions, contrary to this Court's decision in *Nat. R.R. Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), that the remedies expressed in a statute are ordinarily the exclusive means to enforce the duties imposed by the Act. Second, in holding that jurisdiction may be based on facts occurring after suit had been filed, the courts below contravened this Court's decisions in *Mollan v. Torrance*, 9 Wheat. 537 (1824) and *Minneapolis & St. L.R. Co. v. Peoria & P.U.R. Co.*, 270 U.S. 580 (1926) that Federal Court jurisdiction is determined by the facts which exist at the time suit is filed.

C. In upholding subject matter jurisdiction under Title VII in this case, the lower courts neglected to give effect to the intentions of Congress expressed in the procedural limitations of §2000e-5, as recognized

by this Court (e.g. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Such decisions as *Spirit v. Teachers Ins. & Annuity Assn.*, 416 F.Supp. 1919 (S.D. N.Y. 1976) indicate that Congress' expressed prerequisites have been virtually abandoned as limitations on Title VII litigation. In departing from established rules of decision as expressed in *Rondeau, Nat. R.R. Passenger Corp., Mollan* and *Minneapolis & St. L.R. Co.*, the Court of Appeals decision has improperly extended Federal Court jurisdiction. [See *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951)].

II. Assuming that the lower courts had jurisdiction of Mrs. Berg's Title VII claims, their decisions on the merits were incorrect. *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. ..... (1976), have established that absent invidious discrimination, employers are free to include or exclude pregnancy or any other physical condition from sickness or disability benefit plans. The rationale underlying the *Geduldig* and *General Electric* decisions is that the exclusion of a physical condition from a disability plan is not unlawful discrimination, per se, notwithstanding that the physical condition is peculiar to one sex; provided that the benefits of the plan as to covered conditions are available to both sexes alike. Under this reasoning, it is immaterial that the benefit at issue is an accrued paid sick leave allowance rather than sickness or disability insurance.

III. The School District's interim maternity leave policy is consistent with this Court's decision in *Cleveland Board of Education v. LaFleur* 414 U.S. 632 (1974). With respect to Mrs. Berg's claim of sex discrimination under Title VII, the interim maternity leave policy is supported by the same considerations that controlled the *Geduldig* and *General Electric* decisions. Pregnancy is a specific and particular condition. It is different from other illnesses or disabilities which might affect a teacher's capacity to teach. So long as the District does not use pregnancy as a pretext for sex discrimination, it may make special provisions responsive to the actual problems presented by pregnant teachers.



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## ARGUMENT

### I

### THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OF MRS. BERG'S TITLE VII CLAIMS

Mrs. Berg brought this action under 42 USC §§1981 and 1983, the Fourteenth Amendment to the United States Constitution, and 42 USC §2000e-5 (f), to prohibit the School District from applying its maternity leave policy and to compel the District to grant paid sick leave benefits for absences due to pregnancy and maternity. The District Court granted Mrs. Berg summary judgment on her Title VII claims only, over the objection of the School District that she had failed to establish the conditions prerequisite to Federal Court jurisdiction under the statute.

The statutory prerequisites which Mrs. Berg did not meet were (i) filing timely charges of employ-

ment discrimination with the EEOC and (ii) receiving a notice of her right to sue. She failed to meet the first prerequisite because her November 15, 1972, EEOC charge was filed before the School District had taken any action with respect to her and was not filed under oath. She failed to meet the second prerequisite because she filed the instant action before notice of her right to file a civil action was given by the Attorney General.

## A.

### MRS. BERG DID NOT FILE A TIMELY OR VALID EEOC CHARGE

#### 1. Mrs. Berg was not "aggrieved" when her EEOC charge was filed.

Mrs. Berg's EEOC charge was filed before the School District took any action respecting her maternity leave. The charge was filed on November 15, 1972, and states: "Up to this point, I have had no written correspondence with the district concerning this matter." It was not until December 14, 1972, that she requested maternity leave, and she did not request postponement of her leave to the day before her expected confinement until December 20, 1972. Apart from requesting that its own physician examine her, the School District never had a chance to apply its maternity leave policy in her case.

The statute provides for the filing of an EEOC charge by "a person claiming to be aggrieved" [42 USC §2000e-5(b)], "within one hundred and eighty days after the alleged unlawful employment practice occurred" [42 USC §2000e-5(e)]. This language contemplates some occurrence between the respondent



and the charging party giving rise to a claim upon which a timely EEOC charge must be filed.

In *Hackett v. McGuire Bros.,* 445 F.2d 442 (3rd Cir. 1971), the Court concluded that the use in 42 USC §2000e-5 of the language, "a person claiming to be aggrieved," showed a congressional intention to define standing for charging purposes as requiring the same "injury in fact", required for standing under Article III of the Constitution.

This interpretation has been followed by the EEOC, which ruled that to establish standing as an aggrieved person within the meaning of Title VII, a charging party must allege that he or she has been injured in fact (EEOC Decision No. 75-006, July 30, 1974; 11 FEP Cases 1498).

To establish injury in fact, a plaintiff or claimant must allege more than speculative or hypothetical harm, and under Title VII a respondent ought not to be subjected to an EEOC charge without having taken some action referable to the charging party. This Court has recently held that conjectural and abstract claims of injury are not sufficient to establish the "injury in fact" giving rise to a justiciable claim. *Warth v. Seldin,* 442 U.S. 490 (1975); *Schlesinger v. Reservists To Stop The War,* 418 U.S. 208 (1974).

In Title VII cases, the Congressional mandate that an EEOC charge be filed within one hundred and eighty days after occurrence of an unlawful employment practice gives rise to the need for a rule of decision that will enable lower courts and parties to

ascertain when the mandated period of limitations will begin. Petitioners believe that such a rule should at least require tangible injury of the kind required for Article III jurisdiction. In this case, Mrs. Berg filed an EEOC charge while the School District's maternity leave policy was in a state of flux. Between the time she filed her charge in November and requested leave in December, the policy had been materially changed and was in an "interim" status. Before December, the School District had no opportunity to determine its course of action respecting Mrs. Berg, and petitioners do not believe that she was "aggrieved" when she filed her November 15, 1972, EEOC charge.

**2. Mrs. Berg's EEOC charge was not under oath and was therefore not a valid charge.**

The statute requires that EEOC charges be "under oath or affirmation" and "in such form as the Commission requires" [42 USC §2000e-5(b)]. The regulations of the Commission require that a charge be sworn to before a notary public, Commission representative, or other person empowered to administer oaths. (29 C.F.R. §1601.8.) Mrs. Berg's charge purported to be signed under oath or affirmation, but it was not under oath in the form required by the Commission in that it failed to show her oath was taken by any person authorized to administer an oath.

Several courts have held that this deficiency might be remedied after the fact, but the oath to the charge had not been perfected at the time Mrs. Berg brought her District Court action on February 5, 1973. When



judgment was granted by the District Court there was no showing that this defect had been remedied.

In *Russell v. American Tobacco Co.,* 528 F.2d 357 (4th Cir. 1975), cert. den., the court held that the requirement of the 1964 Act that a Title VII complaint be sworn to was not a jurisdictional prerequisite to suit. But the oath provision was modified by the 1972 amendments to Title VII, and the provision applicable to this action is that "Charges shall be in writing under oath or affirmation". Use in legislation of the word "shall" imports a mandatory direction *(Escoe v. Zerbst,* 295 U.S. 490, 493 [1935]. In *EEOC v. Appalachian Power Co.,* ....., F.Supp. ....., 13 FEP Cases 1294 (W.D. Vir. 1976), the District Court held that the requirement that an EEOC charge be under oath was mandatory under the modified language of the statute. Given the absence of an oath, the Court found that the EEOC charge was not valid and that the Court was without jurisdiction.

Petitioners believe that Congress' intent in introducing the word "shall" into the statute is clear and that under Title VII as amended in 1972, an EEOC charge is not valid unless it is under oath and in the form required by the Commission.

## B.

### MRS. BERG'S SUIT WAS NOT AUTHORIZED BY A TIMELY NOTICE OF HER RIGHT TO SUE

This action was filed before Mrs. Berg received the Attorney General's statutory notification of her right to bring a private civil action [42 USC §2000e-5(f)

(1)]. The Court has clearly and repeatedly expressed its view that the notice required by the statute is a prerequisite to Federal Court jurisdiction of a Title VII suit:

> "Title VII . . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§2000e-5(b), (e), and (f)." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 at 47 (1974).

See also: *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 at 798 (1973).

Nevertheless, in its decision below, the Ninth Circuit held that Title VII implicitly vests the Federal Courts with jurisdiction of private suits prior to compliance with the statutory prerequisites to a private civil action. The Circuit Court further held that jurisdictional defects in Title VII actions can be cured by subsequent fulfillment of the statutory prerequisites. Petitioners contend that those rulings were erroneous.

**1. The Court of Appeals' Decision that Federal Courts may take preliminary jurisdiction of a Title VII Action to maintain the status quo is not substantiated by the authorities relied upon.**

The 9th Circuit Court said:

> ". . . , it appears to us that the district court had subject matter jurisdiction under Title VII



> itself to reach the merits of the preliminary injunction issue. In a limited class of cases such as this one, in which there exist both a high probability in the claimants ultimate success on the merits and the threat of irreparable injury of the sort which the Act seeks to avoid, a Title VII claimant may personally bring suit to maintain the status quo pending disposition by the EEOC of the underlying charge of discrimination. See *Drew v. Liberty Mutual Insurance Co.,* 480 F.2d 69, 72-76 (5th Cir. 1973); *Culpepper v. Reynolds Metals Company,* 421 F.2d 888, 893-895 (5th Cir. 1970); Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1256-1259 (1971)." (Opinion below, 528 F.2d 1208 at 1211-1212).

That opinion relies primarily on the authorities cited.

**a. Drew v. Liberty Mutual Insurance Co., 480 F.2d 69 (5th Cir. 1973) supports the court's decision but is based on an erroneous premise.**

The *Drew* opinion is on point. It holds that a private individual may sue in Federal Court to maintain the status quo pending action by the EEOC on a charge of discrimination under Title VII, before a "Notice of Right to Sue Within 90 days" has been issued. The Court in *Drew* stated that Title VII expressly declares certain discriminatory practices to be unlawful [42 USC §2000e-2(a)]. It further stated that general Federal Court jurisdiction to enforce Title VII was to be implied from the Fifth Circuit decision in *Sanders v. Dobbs Houses, Inc.,* 431 F.2d 1097 (5th Cir. 1970) and the Supreme Court decision in *Jones v. Alfred Mayer Co.,* 392 U.S. 409 (1968).

In *Jones* the Supreme Court upheld Federal Court jurisdiction under 28 USC §1343(4) of a civil action to enforce rights based on 42 USC §1982. But in that case the Civil Rights Act provision lacked any explicit method of enforcement (See 392 U.S. 409 at 412, footnote 1, and at 414, footnote 13). The *Sanders* decision followed the rationale of *Jones* and permitted a Federal Court action to enforce 42 USC §1981.

But the rationale for jurisdiction under 28 USC §1343(4) expressed in the *Jones* decision is not applicable to Title VII actions. Title VII is not silent respecting the rights of individuals to bring private civil actions. 42 USC §2000e-5(f) specifically provides for private civil actions by persons alleging employment practices unlawful under the Act. Where jurisdiction exists under Title VII independent of 28 USC §1343, the rationale expressed in *Jones* and *Sanders* is inappropriate.

In any event, jurisdiction under §1343 exists only as to civil actions "authorized by law." The civil actions "authorized by law" under Title VII are subject to the prerequisites expressed in §2000e-5.

In *Troy v. Shell Oil Company,* 378 F.Supp. 1042 at 1046-1048 (E.D. Mich. 1974), (appeal dismissed as moot, 519 F.2d 403, 6 Cir. 1975), the District Court recognized that the Fifth Circuit's reasoning in *Drew* did not substantiate the decision it reached.

> ". . . when discrimination of the type covered by both statutes is involved, relief may be available under §1981 et seq. which is not available under Title VII because of a failure to exhaust administrative remedies. See, e.g., *Sanders v. Dobbs Houses, Inc., supra; Boudreaux v. Baton Rouge Marine Contracting Co.,* 437 F.2d 1011 (5th Cir. 1971). But where, as here, the plaintiff can assert no claim under a procedurally unencumbered statute, the readier availability of preliminary relief thereunder is obviously irrelevant." (*Troy v. Shell Oil Company, supra,* 378 F.Supp. 1042 at 1047.)



See also: *Jerome v. Viviano Food Company, Inc.,* 489 F.2d 965 (6th Cir. 1974).

The theory of jurisdiction to grant preliminary relief followed below and in *Drew* leads to a logical conundrum. If Federal Courts have jurisdiction under 28 USC §1343 of Title VII claims free of the statute's jurisdictional prerequisites, that jurisdiction is not partial, but encompasses full authority to adjudicate the claims at issue. On the other hand, if Federal Courts do not have subject matter jurisdiction, they may not assume jurisdiction to grant preliminary injunctive relief. *Arrow Transp. Co. v. Southern R. Co.,* 372 U.S. 658 (1963); *Sires v. State of Washington,* 314 F.2d 883 at 884 (9th Cir. 1963); *Fort Worth Nat'l Corp. v. Federal Savings & Loan Ins. Corp.,* 469 F.2d 47 at 54 (5th Cir. 1972).

Petitioners believe that *Drew* was not correctly decided. The *Drew* case appears to hold that Federal Courts may grant temporary injunctive relief and award attorney fees in a Title VII action without any express jurisdictional basis.

**b. Culpepper v. Reynolds Metals Company, 421 F.2d 888, 893-895 (5th Cir. 1970), does not pass upon acquisition of subject matter jurisdiction.**

The *Culpepper* opinion holds that Federal Courts may, as an exercise of their inherent powers, grant temporary injunctive relief in Title VII actions. But in that case the EEOC charge had been timely filed, the "suit letter" had been issued, and the Federal Court action was timely filed thereafter (421 F.2d 888 at 890). The *Culpepper* decision does not purport to pass on the power of a Federal Court to act when Title VII's statutory prerequisites to a private civil action have not been met.

**c. The Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1256-1259 (1971), does not accord fair value to Congress' prescribed method for resolving Title VII charges.**

The third authority cited in the *Berg* opinion, one also relied upon in *Drew,* is a Harvard Law Review note. In petitioners' opinion, the views expressed in the note cannot be reconciled with the Title VII mandate of "informal methods of conference, conciliation, and persuasion." [42 USC §2000e-5(b)]. In *Alexander v. Gardner-Denver Co., supra,* 415 U.S. 36, this court recognized a principle of Title VII that has been frequently emphasized by court decisions: Congress' objective under the Act is, where possible, to resolve employment discrimination charges by State and Federal administrative action without subjecting employers to suit in the Federal Courts. Congress' intention in this regard is clearly expressed in the language of 42 USC §2000e-5:



> "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall* endeavor to eliminate any such alleged unlawful practice by informal methods of conference, conciliation, and persuasion." (42 USC §2000e-5(b), emphasis added.)

The law review article advances the theory that courts can assume jurisdiction of a cause of action, without express statutory authority, to preserve the status quo pending administrative proceedings. With respect to Title VII matters, the law review adopts a position which may be said to suggest court actions as a "touch of the whip" to reluctant employers:

> ". . . the granting of such relief would not do violence to the expressed statutory preference for voluntary conciliation over court action. . . . Ultimately, the granting of preliminary relief might enhance, rather than destroy, the effectiveness of conciliation by increasing the pressure on the respondent to agree to settlement. . . .
>
> The relief available through preliminary injunctions in similar situations is generally characterized as the preservation of the status quo. Yet ascertaining the status quo is often difficult and relief pendente lite can be more accurately characterized as *'a temporary settlement based on a free evaluation of all the equities.'"* (84 Harv.L.Rev. 1109 at 1258, emphasis original.)

Petitioners do not agree that such a "temporary settlement" by preliminary injunction would "not do violence" to the Congress' expressed preference for voluntary conciliation. The Court can take judicial

notice that in many cases the granting of a preliminary injunction involves an effective adjudication of litigated disputes:

> "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." (Rule 65(a)(2), in part, Federal Rules of Civil Procedure.)

In petitioners' opinion, the entrance of a Federal Court into any dispute under Title VII will involve the judge in all decision-making thereafter. If this Court is concerned to reduce the workload of District Courts, this approach should be rejected. A responding party would be ill-advised to attempt resolution of an EEOC conciliation proceeding without also settling any pending litigation on the subject. Also, it is difficult to believe Congress contemplated that an employer could be subjected to a Title VII attorney fee award, as in *Drew,* when that employer had not been given the benefit of the opportunity for conciliation mandated by the statute.

**d. The Court of Appeals improperly relied upon a presumption of irreparable injury.**

Petitioners do not believe that Mrs. Berg made a showing of irreparable injury when she requested and obtained preliminary injunctive relief. Her motion was brought to obtain a preliminary injunction prohibiting the School District from forcing her to take a leave of absence before the time she and her



physician determined that was necessary. (Order Granting Motion For Preliminary Injunction, R. 71-72). The School District's interim policy permitted her to work to within thirty days of her delivery date, and the only injury threatened by application of that policy was the loss of three or four weeks of employment with pay. If Mrs. Berg had suffered harm resulting from application of the policy, such loss was easily compensable by money damages.

The District Court and the Court of Appeals did not purport to find that Mrs. Berg was threatened with actual irreparable injury. Rather, they adopted the position that irreparable injury would be presumed upon a finding that the School District's interim maternity leave policy violated Title VII.

> "As noted in *Culpepper, supra,* 421 F.2d at 894-895, the existence of irreparable injury may in appropriate circumstances be presumed, for purposes of preliminary injunctive relief, from the district court's preliminary determination that Title VII has been violated." (Opinion below, 528 F.2d 1208 at 1212, n.6, emphasis original).

Petitioners believe the holding of the Court of Appeals that irreparable injury may be presumed from a perceived violation of law, is contrary to this Court's decision in *Rondeau v. Mosinee Paper Corporation,* 422 U.S. 49, (1975). In *Rondeau,* a private litigant had obtained injunctive relief in a suit under §13(d) of the Williams Act [15 USC §78m(d)]. This Court granted certiorari to determine whether

a showing of irreparable harm is necessary for a private litigant to obtain an injunction under the Act. The Court pointed out that the basis for injunctive relief in the Federal Courts:

> "'. . . has always been irreparable harm and inadequacy of legal remedies.' *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500, 506-507 (1959)" (*Rondeau v. Mosinee Paper Corporation, supra,* 422 U.S. 49 at 57).

The *Rondeau* opinion rejected the proposition that the bare fact of a Williams Act violation could justify injunctive relief without regard to traditional equitable principles:

> "Thus, the fact that respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites for injunctive relief." (*Rondeau v. Mosinee Paper Corporation, supra,* 422 U.S. 49 at 64-65.)

When Congress amended Title VII in 1972 to authorize Commission action to obtain preliminary injunctive relief, it demonstrated its commitment to the application of traditional judicial standards by requiring that such relief be obtained only "in accordance with Rule 65 of the Federal Rules of Civil Procedure" (42 USC §2000e-5(f)(2), in part).

The holding of this Court in *Rondeau* and the intentions of Congress, demonstrated by specific statutory reference to Rule 65, were violated when the lower courts in this case permitted preliminary



injunctive relief to be based upon presumed irreparable injury arising from a perceived Title VII violation.

**2. The Court of Appeals' decision that jurisdictional defects in Title VII actions can be cured by subsequent fulfillment of the statutory prerequisites is not substantiated by the authorities relied upon.**

The 9th Circuit Court opinion says:

> ". . . the later issuance of the 'right to sue' letter coupled with the filing of the supplemental complaint operated to cure any initial jurisdictional defect. *Henderson v. Eastern Freight Ways, Inc.,* 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied,* 410 U.S. 912 (1973); *Jones v. United Gas Improvement Corporation,* 383 F.Supp. 420, 424 (E.D. Pa. 1974); *Dodge v. Giant Food, Inc.,* 3 EPD ¶8184 (D.D.C. 1971), affd., 488 F.2d 1333 (D.C. Cir. 1973)." (Opinion below, 528 F.2d 1208 at 1212.)

**a. Henderson v. Eastern Freightways, Inc., 460 F.2d 258 (4th Cir. 1972) supports the court's decision but is based on an erroneous premise.**

The *Henderson* decision is the leading authority for the proposition that a notice of right to sue issued after a Federal Court action has been filed under Title VII has the effect of curing the jurisdictional defect and validating the pending action. Apart from a generalized statement that Title VII should be generously construed, the rationale advanced by the *Henderson* opinion is:

> ". . . a general policy of law to find a way in which to prevent loss of valuable rights, not because something was done too late but rather

because it was done too soon. *Avery v. Fischer,* 360 F.2d 719, 723 (C.A. 5, 1966)." (460 F.2d 258 at 260.)

For an explanation of the rule applied in *Henderson* one must look to *Avery v. Fischer,* 360 F.2d 719 (5th Cir. 1966). The *Avery* opinion concerns a prematurely filed claim asserted in a proceeding under Chapter X of the Bankruptcy Act. The opinion describes several cases in which premature bankruptcy claims were allowed and in which premature filing of notices of appeal were permitted, although *Avery* held the claim in question was not timely filed. The autorities cited in *Avery* and underpinning the *Henderson* decision do not involve the basic, subject matter jurisdiction of Federal Courts. In such matters as the filing of bankruptcy claims and exercising appellate jurisdiction under their own rules, courts have considerable freedom to exercise their own judgment and discretion. This is not true when subject matter jurisdiction is at issue. The jurisdiction of the Federal Courts is controlled by Congress under Article III of the Constitution, and the courts are strictly constrained to ascertain and follow the congressional mandate.

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court . . . would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Cas. Co. v. Finn,* 341 U.S. 6 at 17-18 (1951).



> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Ambrecht,* 327 U.S. 392 at 395 (1946).

**b. The decision in Jones v. United Gas Improvement Corporation, 383 F.Supp. 420, 424 (E.D. Pa. 1974) is not applicable to the facts of this case.**

In *Jones* the plaintiff had been discharged on July 6, 1971, and filed a charge of discrimination with the EEOC the next day. More than two *years* later Jones and his attorney requested a "right to sue letter", which took three months to obtain, during which time suit had been filed. The Court pointed out that under 42 USC §2000e-5(f)(1) the EEOC is required to give the notice permitting a civil action after one hundred and eighty days from the time a charge is filed, and stated:

> ". . . courts have almost invariably held that action or inaction by the EEOC should not prejudice the right of an individual to a judicial determination of the merits of his claim of discrimination." (383 F.Supp. 420 at 424.)

In this case, Mrs. Berg filed an EEOC charge on November 15, 1972, prior to any action by the School District. She requested an EEOC notice on January 12, 1973, 58 days after the charge and 16 days after the School District's December 27, 1972, letter requesting that she agree to be examined by a Dis-

trict physician. The Attorney General's notice of her right to file a civil action is dated February 21, 1973, 98 days after her November charge. This notice was premature. Title VII requires either that a charge be dismissed or that one hundred eighty days be allowed for Commission action before a notice of right to sue is authorized [42 USC §2000e-5(f)(1)]. Furthermore, the EEOC regulations authorize demand of such a notice only after expiration of one hundred and eighty days, [29 C.F.R. §1601.25b(e)]. Mrs. Berg was not prejudiced by EEOC inaction beyond the one hundred and eighty day waiting period. Rather, the opposite is the case. She filed a premature charge, filed a premature Federal Court action, and received a premature notice from the Attorney General upon her demand. All of these actions were contrary to the language and intentions of Title VII.

**c. Dodge v. Giant Food, Inc., 3 EPD ¶8184 (D.D.C. 1971), [3 F.E.P. Cases 374], affd., 488 F.2d 1333 (D.C. Cir. 1973) does not provide any rationale for its conclusion.**

The *Dodge* case includes a holding by the District Court consistent with the decisions in *Henderson* and the opinion below. But the District Court opinion in *Dodge* does not advance a rationale for its conclusion except to state that the notices of right to sue issued after the action was filed "cured the jurisdictional defect in plaintiffs' original complaint." The Court of Appeals affirmed the District Court without commenting on the receipt of the notices after filing of the action.



**3. The Court of Appeals' decision contravenes established rules respecting statutory construction and the vesting of Federal Court jurisdiction.**

**a. The decision is contrary to the rule that express statutory provision for one form of proceeding implies that no other means of enforcement is intended.**

Title VII has always contained express provisions indicating the circumstances under which Federal Court actions might be maintained under the statutes, and designating the persons empowered to bring such actions. The 1972 amendments to Title VII gave the EEOC and the Attorney General power to bring a Federal Court action for preliminary relief pending final disposition of a charge [42 USC §2000e-5(f)(2)]. The *Drew* decision held that Congress did not intend to restrict this right exclusively to the agencies named in the amendments. But it is a rule of statutory construction that when legislation expressly provides a particular remedy, courts should not expand the coverage of the statute.

In *Nat. R.R. Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), the Association as a private party brought an action under §307 of the Amtrak Act (45 USC §547) to enjoin the discontinuance of certain passenger trains. The statute authorized suit by the Attorney General and by employees in the case of labor agreements. As to other private actions, the Court held:

> "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U.S. 282, 289, 73 L.Ed. 379, 49 S.Ct. 129 (1929). This principle of statutory construction

reflects an ancient maxim—expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in §307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." (414 U.S. 453 at 458.)

Petitioners believe that the limited authorizations given for suit by the Amtrak Act and the limited authorizations expressed in Title VII are similar in kind and subject to the rule of construction expressed above. See also: *SEC. Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975), and *Goldman v. First Federal Sav. & L. Assn. of Wilmette,* 518 F.2d 1247 (7th Cir. 1975).

This rule of construction will yield in the face of clear contrary evidence of legislative intent (*Nat. R.R. Passenger Corp. v. Passengers Assn., supra*). Petitioners do not believe the legislative history shows a contrary intention. The joint explanatory statement to the conference report on HR 1746 specifically discussed the provision in question, and there is no evidence that a private right to obtain preliminary injunctive relief was contemplated:

> "The Senate amendment authorized the Commission or the Attorney General to seek preliminary injunctive relief. The House bill authorized the Commission to seek preliminary relief and required a showing that substantial and irreparable injury to the aggrieved party would be unavoidable. The Senate receded with



> an amendment that authorizes the Commission or the Attorney General to seek preliminary injunctive relief and a provision that Rule 65 of the Federal Rules of Civil Procedure should govern all actions brought under this subsection." (Joint Explanatory Statement of Managers At The Conference On HR 1746 To Further Promote Equal Employment Opportunities For American Workers, in part, *U. S. Code Congressional and Administrative News,* 92nd Congress, Second Section (1972) Vol. 2, p. 2182.)

**b. The decision is contrary to the rule that Federal Court jurisdiction is determined by the facts which exist at the time suit is filed.**

In *Mollan v. Torrance,* 9 Wheat. 537 (1824) the diversity jurisdiction of the District Court was placed in issue by a plea that plaintiff's endorser and the defendants were both citizens of the State of Mississippi. The plea was claimed to be defective because it alleged lack of diversity at the time of the plea and not at the time the action was brought. The opinion by Chief Justice Marshall states:

> "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." (9 Wheat. 537 at 539.)

The Supreme Court applied this rule in *Minneapolis & St. L.R. Co. v. Peoria & P.U.R. Co.,* 270 U.S. 580 (1926) on a motion to remand. The motion was based upon the occurrence of new factual developments allegedly perfecting the jurisdiction of the District Court. Justice Brandeis wrote:

> "The later facts alleged could not conceivably affect the result of the case before us. The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought." (270 U.S. 580 at 586.)

See also: *National Labor Rel. Bd. v. Atlanta Metallic Casket Co.*, 205 F.2d 931 (5th Cir. 1953); *Royalty Service Corporation v. City of Los Angeles*, 98 F.2d 551 (9th Cir. 1938).

Petitioners believe that this rule is correct in principle and that great mischief and uncertainty will result if it is not followed. If Federal Court jurisdiction can be acquired as a result of facts occurring after an action is filed, speculative litigation will be encouraged and the effect of all statutes governing jurisdiction will be left in doubt. This is contrary to the principle expressed in *American Fire & Ca. Co. v. Finn, supra:*

> ". . . prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation. . . ." (341 U.S. 6 at 8.)

## C.

### MRS. BERG'S TITLE VII CLAIMS SHOULD BE DISMISSED

Petitioners believe the decision of the Court of Appeals can not be substantiated upon a careful examination of its rationale. But petitioners recognize that courts are loath to turn away those who seek their aid, and believe this concern motivated



the Court of Appeals to adopt a rule "that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits" (528 F.2d 1208 at 1212). Nevertheless, the decision of the Court of Appeals has improperly extended Federal Court jurisdiction in Title VII cases.

#### 1. The Court of Appeals' decision contravenes the procedural limitations imposed by Congress on private Title VII actions.

The enforcement provisions of Title VII are specific and elaborate. A charge must meet specific requirements as to writing, oath, and form. The charge must be filed by or on behalf of a person claiming to be aggrieved. The charge must be filed within 180 days after occurrence of the alleged unlawful employment practice. There must be deferral in favor of State unlawful employment practice proceedings. Many specific functions are required of the EEOC and the Attorney General. The statute provides for notice of right to sue only after the EEOC has dismissed a charge or after one hundred and eighty days have passed without conciliation or other action by the EEOC or the Attorney General. It cannot reasonably be said that Congress did not intend these procedures to be followed. The enactment of Title VII and its 1972 amendments involved great legislative contests and intensely opposing forces. The complexities of the Act reflect compromises that all interested sides made. These compromises were required to obtain enactment of the law, and it was enacted with the intent that its provisions

be observed. The Courts must observe the intentions of Congress notwithstanding that adherence to the letter of the statute will require the rejection of claims which may deserve their sympathies.

> "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of the words employed." *Flora v. United States,* 357 U.S. 63 at 65 (1958).

In *Love v. Pullman Co.,* 404 U.S. 522 (1972); *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792; and *Alexander v. Gardner-Denver Co., supra,* 415 U.S. 36, this Court has recognized the limitations imposed by Congress upon the rights of private persons to institute Federal Court actions under Title VII. These jurisdictional prerequisites include i) the filing of timely EEOC charges and ii) receipt of the statutory notice of right to sue.

But the decision of the Court below permits a Title VII action to be maintained practically in disregard of the policies expressed by Congress. Permitting premature court proceedings can only derogate from Congress' concern that informal methods of conciliation and persuasion be utilized before private litigation is allowed.

The holding that Title VII jurisdiction can be validated after a Federal Court action has been filed, has led to results that cannot have been approved by the Congress that enacted Title VII. In *Spirt v. Teachers Ins. & Annuity Assn.,* 416 F.Supp. 1019



(S.D.N.Y. 1976) the plaintiff filed suit before filing a charge with the EEOC. A notice of right to sue was eventually issued more than a year after the action had been filed. The Court upheld its jurisdiction under Title VII on the validation theory expressed in *Henderson v. Eastern Freight Ways, supra,* 460 F.2d 258. Similarly, in *Black Musicians of Pittsburgh v. Local 60-471, Am.Fed.M.,* 375 F. Supp. 902 (W.D. Pa. 1974), relying on *Henderson,* the District Court upheld its jurisdiction under Title VII of a suit brought before the filing of an EEOC charge or the issuance of a notice of right to sue. The results in these cases indicate negation by the Federal Courts of those provisions in Title VII which call for negotiation and impose a one hundred and eighty day waiting period before a private suit may be filed absent earlier dismissal of charges by the EEOC.

**2. The Court of Appeals' decision improperly extends Federal Court jurisdiction.**

In *American Fire & Cas. Co. v. Finn, supra,* 341 U.S. 6, this Court held that Federal Courts must strictly adhere to limitations on their subject matter jurisdiction. In *Minneapolis & St. L.R. Co. v. Peoria & P.U.R. Co., supra,* 270 U.S. 580, this Court held that jurisdiction can not be obtained by virtue of events occurring after an action has been filed. The decision of the Court of Appeals, and the decisions in *Drew* and *Henderson* do not adhere to these rules. Those decisions require the District Courts to adjudicate private Title VII claims at the outset of a

dispute. But Congress did not intend to allow private preliminary adjudication in Title VII cases. In the view of petitioners, such preliminary adjudication can only result in ousting Title VII claims from the administrative forum. Apart from violating the principles of decision expressed in *American Fire* and *Minneapolis*, this extension of jurisdiction serves to further load a court system that is overextended with respect to its responsibilities. Courts cannot complain of burdens imposed on them by Congress when by lack of self restraint and failure to adhere to rules, they undertake to entertain claims and actions not authorized by statute.

An equally serious problem presented by the decision below is its tendency to encourage operation of our legal system by exceptions rather than by rules. There is great public concern, most apparent respecting criminal law, that the system of justice in the United States is not even-handed. When Courts adopt rules of decision that abandon long established principles such as that expressed by Justice Brandeis in *Minneapolis*, in favor of special cases such as that of Mrs. Berg, they favor special pleading and introduce uncertainty into the law.

If the rule that Federal Court jurisdiction must be determined at the time an action is filed does not apply in Title VII actions, when does it apply? Has the rule been overthrown? If it has, what is the general rule of decision as to when jurisdiction vests? These are very serious questions that will be raised by lawyers and lower courts looking for guidance in



their conduct of future litigation, if this Court affirms the decision of the Court of Appeals.

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## II

### THE SCHOOL DISTRICT'S FAILURE TO ALLOW SICK LEAVE PAY FOR ABSENCES DUE TO NORMAL PREGNANCY AND DELIVERY DID NOT VIOLATE TITLE VII.

In California, school districts are agencies of the state; their regulation and operation are controlled by the State Constitution, and the State Legislature is given comprehensive powers in relation to them. [*Hall v. City of Taft*, 47 C.2d 177 at 179-181, 302 P.2d 574 (1956).] The Legislature enacted Education Code §13456, which governs California school districts respecting maternity leave for teachers. When this action arose, §13456 included the following provisions:

> "The (school district) governing board . . . shall provide for such leave of absence from duty as it deems appropriate for . . . pregnancy or convalescence following childbirth . . . .
>
> ". . . the board may also provide . . . whether leave granted under this section shall be with or without pay . . . .
>
> "This section shall not be construed as requiring the governing board of a school district to grant leave under this section only with pay." (Cal. Education Code, §13456, in part.)

In accordance with this statutory authorization, the School District maintained a maternity leave policy

that did not allow the use of accumulated sick leave credits to permit pay during normal maternity leave. Relying on its decision in *Hutchison v. Lake Oswego School District No. 7,* 515 F.2d 961 (9th Cir. 1975), the Court of Appeals held that the policy of the School District violated Title VII. The judgment in *Hutchison* has been vacated by this Court and the case remanded to the Ninth Circuit for further consideration in light of *General Electric Co. v. Gilbert,* 429 U.S. ..... (1976) [*Lake Oswego School District No. 7 v. Hutchison,* No. 75-568, ..... U.S. .....].

Petitioners contend that the decisions of this Court in *Geduldig v. Aiello,* 417 U.S. 484 (1974) and *General Electric Co. v. Gilbert,* 429 U.S. ..... (1976) are controlling with respect to legality of the School District's failure to allow sick leave usage for absences due to normal pregnancy. In *Geduldig,* this Court held that absent invidious discrimination, lawmakers are constitutionally free to include or exclude pregnancy or any other physical condition from legislation establishing a disability insurance program, on any reasonable basis. (417 U.S. at 496-497, n. 20). In *General Electric* the Court extended the reasoning of *Geduldig* to claims under Title VII. The basic rationale underlying the *Geduldig* and *General Electric* decisions is that exclusion of a physical condition from a disability insurance plan is not unlawful discrimination per se, notwithstanding that the physical condition is peculiar to one sex. In such cases, the benefits of the plan in terms of those conditions that are covered, are available to both sexes alike.



> "Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under §703(a)(1), 42 USC §2000e-2(a)(1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all." *General Electric Co. v. Gilbert,* 429 U.S. ..... at .....

The principle of the decisions in *Geduldig* and *General Electric* is applicable to sick leave plans as well as insurance plans. By law in California, full-time teachers accrue entitlements to ten days leave of absence for illness or injury with full pay, for each school year of full-time service. This sick leave entitlement accumulates from year to year (Cal. Education Code §13468). Arguably, the entitlement to paid leave for illness or injury provided at the time of this action did not include pregnancy insofar as pregnancy is a natural condition and not an illness or injury (Thebaut affidavit, A. 56). In any event, the School District excluded sick leave usage for pregnancy leave under §13456. This exclusion of pregnancy from the sick leave plan did not constitute a violation of Title VII unless (a) it was in fact a pretext for gender-based discrimination or (b) it resulted in gender-based effects in terms of disproportionate benefits provided. (*General Electric Co. v. Gilbert, supra,* 429 U.S. ..... at ..... This case was decided on Mrs. Berg's motion for summary judgment upon the theory that the School District's policy was prima facie unlawful under Title VII as

interpreted by the applicable EEOC guideline [29 C.F.R. §1604.10(b)], without regard to the School District's actual intent or to any showing of a gender-based effect. Accordingly, the District Court erred in granting summary judgment to Mrs. Berg on the issue of her right to sick leave pay.

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## III

### THE SCHOOL DISTRICT'S INTERIM MATERNITY LEAVE POLICY DID NOT VIOLATE TITLE VII

The School District has never agreed that insistence upon an examination by its own physician was a procedure limited to pregnant women. Every employer must be able to act when an employee's work is affected by medical conditions or injuries. When children are the subject of that work, an employer's duties in this regard are even greater. But the specifics of the policy at issue in this litigation are peculiar to pregnancy. This particularity was found by the Courts below to give rise to a Title VII violation.

California Education Code §13456, in addition to requiring maternity leave, authorized school district governing boards to adopt reasonable rules and regulations.

> "'. . . prescribing the manner of proof of pregnancy; and 'the point during the course of the pregnancy at which leave of absence shall be taken' . . . ." (Cal. Education Code, §13456, in part.)

The record shows that the School District was working to reformulate its maternity leave policy at the



time this action was filed. On December 13, 1972, the governing board approved an interim policy authorizing consideration of employee requests to work beyond the seventh month of pregnancy, on an individual basis. When this suit was filed on February 5, 1973, the School District found itself with a modified policy which did not provide standards for decision, a demand supported by Mrs. Berg's personal doctor that she be permitted to work until the day of her confinement, and a legal situation dominated by the conflicting Court of Appeals decisions in *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972) and *Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973). To attempt a resolution of its problems, the School District obtained an authoritative medical opinion and formulated an interim maternity policy providing for individual consideration of the starting dates for maternity leave and a means of evaluating requests to work beyond thirty days before the expected date of delivery.

The School District's interim maternity leave policy provisions are valid under this Court's decision in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). The interim policy provides for individual consideration of a teacher's request to continue work, based on medically verified standards which take the teacher's working conditions into account, and provide a right of appeal in the case of disagreement. In the *Cleveland Board* opinion this Court stated:

> "The school boards have available to them reasonable alternative methods of keeping physically

unfit teachers out of the classroom. For example, they could require the pregnant teacher to submit to medical examination by a school board physician . . . ." (414 U.S. 632 at 647, n. 14.)

The decision of the Court of Appeals held the very alternative suggested by this Court in the *Cleveland Board* opinion, to be in violation of Title VII as interpreted by the EEOC.

Petitioners believe that the decisions of this Court in *Geduldig v. Aiello, supra,* 417 U.S. 484; and *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., are applicable with respect to the maternity leave policy provisions as well as to the pay provisions. The *Geduldig* rationale is not limited to pay benefits.

> "Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts . . . lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." (*Geduldig v. Aiello, supra,* 417 U.S. 484 at 496 n. 20.)

In its *General Electric* decision, this Court recognized that pregnancy is significantly different from other diseases or disabilities:

> ". . . we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is of course confined to women, but it is



> in other ways significantly different from the typical covered disease or disability." (*General Electric Co. v. Gilbert, supra,* 429 U.S. ..... at .....)

Pregnancy is unique and different from other diseases or disabilities. Absent a scheme of invidious discrimination, Title VII is not violated by a procedure designed to obtain an informed opinion when there is disagreement as to the proper time for a maternity leave to begin. Mrs. Berg did not contest the opinions of Dr. Thebaut that a medical report clearing a teacher to work until the date of her confinement would be inconsistent with prudent medical practice; and that a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy. (A. 56) But her private physician had concluded as early as December 6, 1972 that Mrs. Berg could work until the date of her confinement on March 24, 1973. His affidavit to that effect dated December 21, 1972, filed in support of her motion for preliminary injunction. (A. 74) On these facts, the School District had good reason to insist upon expert medical information from its own physician.

Given its duties to the children in her classroom, and its knowledge of hazards described in Dr. Thebaut's affidavit, the District was justified in promulgating a procedure to cope with this problem within the law afterwards expressed in the *Cleveland Board* decision. The policy is particularized because pregnancy is a unique condition, presenting

important factors and considerations not present or relevant with respect to other medical conditions.

If the School District had treated its male and female employees differently with respect to medical conditions common to both, the reasoning of the Courts below might have been well taken. But under the *Geduldig* and *General Electric* decisions, the School District could lawfully take measures appropriate to the particular problems presented by pregnancy as distinguished from other medical conditions.

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## CONCLUSION

For the reasons expressed above, petitioners believe the District Court erred in granting summary judgment for Mrs. Berg and the Court of Appeals erred in affirming that judgment.

If this Court finds the District Court lacked jurisdiction of Mrs. Berg's Title VII claims, petitioners believe the decisions of the Courts below should be reversed with a direction that the case be dismissed. The Trial Court did not pass on Mrs. Berg's claim under 42 USC §1983 against petitioner Snodgrass. But the action against Mr. Snodgrass was in his official capacity (A. 7 ¶V); and the Complaint does not purport to allege personal conduct on his part violative of Mrs. Berg's civil rights. Subsequent to the Trial Court's judgment, this Court decided the legal issues controlling Mrs. Berg's §1983 claim. Under the *Cleveland Board* and *Geduldig* decisions, her §1983 claim against Mr. Snodgrass lacks any substantial



basis and petitioners believe dismissal of that claim is justified.

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may require." *Watts, Watts & Company, Ltd. v. Unione Austriaca Di Navigazione,* 248 U.S. 9 at 21 1918).

If this Court finds that the District Court had jurisdiction of Mrs. Berg's Title VII claims, petitioners believe the District Court's summary judgment should be reversed and the case remanded for proceedings consistent with the decisions in *General Electric Co. v. Gilbert, Geduldig v. Aiello,* and *Cleveland Board of Education v. LaFleur.*

Dated, March 7, 1977.

Respectfully submitted,

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**(Appendix A Follows)**

APPENDIX A



## STATUTES INVOLVED

42 U.S.C. § 2000e-2(a):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(b):

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation

thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.



42 § 2000e-5(e):

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(f)(1):

. . .

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The

person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under a subsection (c) or (d) or this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

. . .

42 U.S.C. § 2000e-5(f)(2):

Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney



General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

29 C.F.R. § 1601.8:

Such charge shall be in writing and signed, and shall be sworn to before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths, and take acknowledgements. Charge forms are available to all persons from all offices of the Commission. Appropriate assistance in filling out forms will be rendered to aggrieved persons or persons filing charges on their behalf by personnel of the Commission.

29 C.F.R. § 1601.25b(c):

(c) At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of a charge at any stage of the proceedings, an aggrieved person may demand in writing that a notice issue pursuant to § 1601.25, and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties.

. . .

29 C.F.R. § 1604.10(b):

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

California Education Code § 13456:

The governing board of any school district shall provide for such leave of absence from duty as it deems appropriate for any female employee of the district who is employed in a position requiring certification qualifications and who is required to absent herself from her duties because of pregnancy or convalescence following childbirth, and shall adopt reasonable rules and regulations prescribing the manner of proof of pregnancy, the point during the course of the pregnancy at which leave of absence shall be taken, and the length of time for which the leave of absence shall continue after birth of the child. Anything in Sections 13467 and 13469 to the contrary notwithstanding, the board may also provide in the rules and regulations whether



leave granted under this section shall be with or without pay and, if with pay, the amount, if any, to be deducted from the salary due the employee for the period in which the absence occurs.

Nothing in this section shall be construed so as to deprive any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy.

The leave provided for in this section is in addition to any other leave provided for by law.

This section shall not be construed as requiring the governing board of a school district to grant leave under this section only with pay.

California Education Code § 13456 (effective, January 1, 1976):

The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.

Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district.

Except as provided herein, written and unwritten employment policies and practices of any

school district shall be applied to disability due to pregnancy or childbirth on the same terms and conditions applied to other temporary disabilities.

This section shall be construed as requiring the governing board of a school district to grant leave with pay only when it is necessary to do so in order that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury, or disability.

California Education Code § 13468:

Every person employed five days a week by a school district in a position requiring certification qualifications shall be entitled to 10 days' leave of absence for illness or injury and such additional days in addition thereto as the governing body may allow for illness or injury, exclusive of all days he is not required to render service to the district, with full pay for a school year of service. A certificated employee employed for less than five school days a week shall be entitled, for a school year of service, to that proportion of 10 days' leave of absence for illness or injury as the number of days he is employed per week bears to five and is entitled to such additional days in addition thereto as the governing board may allow for illness or injury to certificated employees employed for less than five school days a week; pay for any day of such absence shall be the same as the pay which would have been received had the employee served during the day. Credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at any time during the



school year. If such employee dos not take the full amount of leave allowed in any school year under this section the amount not taken shall be accumulated from year to year with such additional days as the governing board may allow.

The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purposes of this section. Such rules and regulations shall not discriminate against evidence of treatment and the need therefor by the practice of the religion of any well-recognized church or denomination.

Nothing in this section shall be deemed to modify or repeal any provision of law contained in Article 3 of Chapter 6 of Division 3 of the Health and Safety Code.

The provisions of Section 13467 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident of any such employee five days a week or to the proportion of 10 days of absence to which such employee employed less than five days a week is entitled hereunder on account of illness or accident or to such additional days granted by the governing board.